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No. 80-1348

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE, *Petitioner,*

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP., *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a maritime in rem proceeding brought by the finders and salvagers wherein the State of Florida's objection under the Eleventh Amendment to the arrest of certain articles of salvage from the wrecked vessel is predicated on a disputed claim of state ownership does the federal district court have the power to make appropriate jurisdictional findings, *i.e.* that the vessel and its cargo, which were sunk before Florida became a state and are located outside of the territorial boundaries of the state, are not and were never owned by the State of Florida.

Note: The Question Presented as worded by the State of Florida assumes the property is "owned" by the State. Petition for Certiorari at I. Both the federal district court and the court of appeals expressly recognized that the Eleventh Amendment would be applicable to an in rem proceeding *if* the vessel and cargo in question *were owned* in fact by the state.

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On Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 621 F.2d 1340 (1980). The decision of the United States District Court for the Southern District of Florida is reported at 459 F.Supp. 507 (1978).

STATEMENT OF THE CASE

Review is sought of the second of two appeals involving ownership of salvage articles from the *Atocha* which was lost in 1622 off the coast of Florida. The respondents Armada Research Corporation and Treasure Salvors, Inc. [hereinafter Treasure Salvors], located the wreck and recovered a substantial amount of salvage through a prolonged and continuing effort at great cost, including the loss of several lives. See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, Nuestra Senora de Atocha*, 569 F.2d 330, 333 (5th Cir. 1978), affirming 408 F.Supp. 907 (S.D.Fla. 1976).

As finders and salvagers, Treasure Salvors instituted in rem and in personam admiralty proceedings concerning the wreck and articles of salvage. In the previous admiralty proceeding, the United States appeared and voluntarily submitted itself to in personam jurisdiction. 569 F.2d at 333. The United States claimed title under the English rule of sovereign prerogative to all of the articles of salvage including those claimed by Florida in the instant proceeding. *Id.* at 340-43. The State of Florida closely monitored the earlier admiralty proceeding, but chose not to formally intervene, as it had negotiated with the United States to protect its claim to the property. 621 F.2d at 1343-44; 459 F.Supp. at 516. On the first appeal title was confirmed in Treasure Salvors as against the United States and privies to the litigation. 569 F.2d at 335-36. The United States did not seek further review.

Following the earlier appeal, an ancillary warrant of arrest was issued by the trial court to seize certain articles of salvage in the custody of agents and employees of the Petitioner-State of Florida. 621 F.2d at 1344. The State filed a Motion to Quash the warrant of arrest in the district court, and an Emergency Petition for Writ of Prohibition or Stay in the Fifth Circuit. *Id.* The Fifth Circuit issued a temporary stay, which it subsequently

dissolved, and denied the Petition for Prohibition. 459 F.Supp. at 508. In denying the Petition for Reconsideration, the Fifth Circuit stated the question of jurisdiction was initially for the trial court to decide:

> The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance *on the basis of such record as may be developed* in that court....Denied. R.v.II 417 (emphasis added).

The trial court denied the Motion to Quash, but stayed execution temporarily and issued a Rule to Show Cause under Admiralty Rule C(5). 621 F.2d at 1344. The trial court afforded the parties a full evidentiary hearing on the jurisdictional issues and merits. *Id.* Judgment was entered in favor of Treasure Salvors. The trial court summarized its rulings as follows:

> For the reasons that follow, this Court *holds:* it had jurisdiction to issue the warrant of arrest and seize the property in question; the Division of Archives is bound by the earlier judgment of this Court; Treasure Salvors, under the judgment of this Court, as affirmed by the Fifth Circuit, is the owner of the property and entitled to possession; the claims of the Division of Archives to be the owner of the property, and to be accordingly entitled to the possession of such, are wholly without merit; and the present proceedings are not barred by the Eleventh Amendment to the Constitution of the United States nor by the Doctrine of Sovereign Immunity.

459 F.Supp. at 511.

The State of Florida's Eleventh Amendment argument depended on the assertion that the State was the owner of the articles of salvage. This was bottomed on the contention that the location of the wreck site was on sovereign submerged lands as Section 267.061(1) (b),

Florida Statutes, purported to grant Florida title to objects abandoned on state owned lands.* The trial court below found:

> The portion of the *res* seized under the warrant of arrest was comprised of articles of salvage recovered from a wreck site located *outside* the jurisdiction of the State of Florida and on lands not owned or possessed by the State of Florida. Section 267.061(1) (b), Florida Statutes, which purports to vest title in the State *does not apply* since the property was not on "sovereignty lands of the State."

459 F.Supp. at 527 (emphasis added).

Under Supreme Court guidelines for applying the Eleventh Amendment and the doctrine of sovereign immunity to admiralty proceedings, the trial court made several jurisdictional findings of fact including that "the Division of Archives is not and never was the owner of the ship *Atocha*, her tackle, apparel, cargo, etc." 459 F.Supp. at 527. Accordingly the trial court concluded that the present proceeding was not barred by the Eleventh Amendment nor the doctrine of sovereign immunity. Florida on appeal did not contest the fact that the wreck site was now located outside the boundaries of the State of Florida. Instead, in a novel argument, Florida contended that the Supreme Court decision in *United States v. Florida*, 420 U.S. 531 (1975), which delineated Florida's

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*Section 267.061 (1) (b) provides:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection.

boundary line, could not be applied retroactively. The jurisdictional findings of the trial court were affirmed by the Fifth Circuit on appeal, that Court concluding:

> In the case at bar, ownership of the salvaged items is determinative of both the eleventh amendment and the merits. Since we agree with the trial court's assessment that Florida lacks an ownership interest in the artifacts, *see* pp. 1348-1349, *infra*, we affirm the judge's holding that the order to show cause is not, in this case, a suit against a state.

621 F.2d at 1346 (footnote omitted).

Florida does not contend in its Petition for Certiorari that the jurisdictional fact findings are erroneous, but relies upon the concept that the State's mere assertion of the Eleventh Amendment denies the federal court jurisdiction. Petition for Certiorari at 7-8. This was the view of Judge Rubin expressed in his dissent in the Fifth Circuit. 621 F.2d at 1350.

As additional and alternative reasons for its holdings, the trial court ruled that the State of Florida had consented by statute to be sued in state or federal court in actions to foreclose liens or quiet title to property in which the state has or claims an interest. 459 F.Supp. at 528. Treasure Salvor's claim against the property would constitute a salvage lien; thus Section 69.041* of the

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*The statute provides in relevant part:

> (1) Under the conditions prescribed in this section for the protection of the state, the state may be named a party to a civil action in any court of this state, or in any district court of the United States, having jurisdiction of the subject matter, either:
>
> (b) For the foreclosure of a mortgage or other lien on real or personal property on which the state has or claims a mortgage or other lien.

Florida Statutes gives an express legislative waiver of immunity. In affirming, the Court of Appeals did not expressly discuss the alternative holdings of the trial court.

REASON WHY THE WRIT SHOULD BE DENIED

A. There is no conflict by the decision below in holding that the district court under the Eleventh Amendment has power to make appropriate jurisdictional fact findings.

The apparent basis under Supreme Court Rule 17 for seeking Certiorari is a purported conflict with decisions by this Court and other decisions by the same circuit. For the reasons that follow, there is no conflict with decisions of this Court, and while intra-circuit conflict is not basis for Certiorari, there is no conflict with other decisions by the Fifth Circuit. The cases cited by Florida in its Petition for Certiorari (page 10) follow the rule that the Eleventh Amendment is applicable to admiralty actions where the state is the owner. None of the cases even suggest that if ownership by the state is *disputed* that the court does not have the power to resolve the jurisdictional issue.*

Both the district court and the Fifth Circuit expressly

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*In two of the cases cited, *Intracoastal Transp., Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973) and *Red Star Towing & Transp. Co. v. State of Connecticut*, 431 F.Supp. 1003 (D. Conn. 1976), there was *no dispute* that the state owned and maintained the bridges which had caused the plaintiffs' damage, so that the question of ownership was never at issue. In another case, *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1115 (5th Cir. 1975), the Fifth Circuit found it unnecessary to consider the claim of sovereign immunity because it reversed for lack of in rem jurisdiction. Therefore, none of these cases involved the issue in the instant case of whether a federal court may make jurisdictional findings to determine that the property in question is not and was never owned by the state, rendering the Eleventh Amendment inapplicable.

recognized that the Eleventh Amendment is applicable to admiralty in rem proceedings *when the state owns the vessel in question* as held by this Court in *In re The State of New York* (The Queen City) 256 U.S. 503 (1921). Because Florida's unsupported claim of ownership was duly challenged, the question of ownership was regarded as a jurisdictional matter to be judicially resolved.

The Fifth Circuit's interpretation and application of *The Queen City* expressly appears in the opinion below:

> The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however, we have a *controverted* claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the *Atocha*. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.
>
> Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic "jurisdiction to determine jurisdiction" line of cases. In that genre, the pivotal jurisdictional question involves essentially the same analysis as is posed by the merits of the case. See *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1957). Where "the issue of jurisdiction is inextricably intertwined with the merits of the controversy," the court retains the case and resolves the issue, since federal courts "always have jurisdiction to determine our

jurisdiction." *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969).[19]

621 F.2d at 1345-46 (emphasis in original).*

By analogy, this Court has recognized in other maritime cases that a claim of sovereign immunity against arrest of a vessel asserted by a foreign government, if challenged, will necessitate the district court to make appropriate jurisdictional findings as to the ownership of the vessel.

In *The Navemar*, 303 U.S. 68 (1933), the Supreme Court considered whether a claim of immunity from arrest of a vessel by the Republic of Spain was an issue for the court to decide. The Court of Appeals for the Second Circuit accepted Spain's suggestion of sovereign immunity as conclusive but the Supreme Court reversed saying:

> This we think was a mistaken view of the force and effect of the suggestion. Admittedly...a public vessel...is immune from suit in the courts of admiralty of the United States....But [the district court] was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive....
>
> But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof ....

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*The Fifth Circuit stated in its footnote:

[19]This approach is especially desirable in admiralty in rem actions. Federal courts have exclusive jurisdiction over admiralty in rem proceedings. *Madruga v. Superior Court of California*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), G. Gilmore and C. Black, The Law of Admiralty 1-13 (2d ed. 1975). If the mere assertion of ownership by a state of a res was sufficient to invoke the eleventh amendment, petitioners such as Treasure Salvors would find themselves stranded without a forum in which to litigate their claim. 621 F. 2d at 1346.

303 U.S. 68, 74-75 (citing *In re Muir* 254 U.S. 522 (1920)). In *In re Muir* the Court said:

> [I]t is apparent that the status of the Gleneden [the ship alleged to be in British service]...is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, *for it turns on the status of the vessel*.... The Court may take up again the question of its jurisdiction.

254 U.S. 522, 533 (1920) (emphasis added).

The sole situation in which an assertion of ownership by a foreign sovereign is considered conclusive is where the United States government *officially* recognizes the foreign state to be the owner. *The Navemar,* 303 U.S. at 434. The exception is not applicable here as we do not have a diplomatic matter involving the conduct of foreign affairs; moreover, the United States itself in the earlier case unsuccessfully claimed to be the owner of the articles of salvage in question.

In an in rem proceeding against a vessel or articles of salvage, the vessel or articles of salvage will be arrested (placed under control or otherwise constructively secured) by the United States Marshal. The rationale, in essence, is if the vessel or property is owned by the state or sovereign, the arrest will be considered a suit against the state or sovereign; if not owned by the state, the arrest of the property does not constitute a suit against the state. Thus the status of the vessel or articles of salvage becomes a jurisdictional fact. In the present case, no judgment has been sought against the State of Florida. The State apparently does not contest the correctness of the jurisdictional fact issues found by the trial court and affirmed by the Court of Appeals. It contends that the federal court has no power to consider whether an Eleventh Amendment objection is valid once the State raises the issue. Petition for Certiorari at 7-8. No case by

this Court or a Court of Appeals so holds. As the trial court stated, the Eleventh Amendment "is not *both* a self-proclaimed *and* self-determined ukase of the state." 459 F.Supp. at 527 (emphasis in original).

This Court in considering the Eleventh Amendment has consistently recognized that the question of whether a suit in fact and in law is against a state is a matter for judicial determination. Indeed, in numerous cases the courts have determined that a suit, notwithstanding a plea of the Eleventh Amendment, was not a suit against a state. *See, e.g., Hutto v. Finney,* 437 U.S. 678 (1978); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Parden v. Terminal Railway,* 337 U.S. 184 (1964).

For example, in a suit to enjoin the enforcement of a state statute, this Court has recognized that if the statute is unconstitutional the proceeding is not one against the state. The Court commented on this proposition in *Ex Parte Young:*

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.

209 U.S. 123, 163 (1907).

In addition to the non-application of the Eleventh Amendment and the statutory consent to be sued in federal court on matters involving a lien on property that is set forth in Section 69.041, *Florida Statutes,* Florida common law as declared by the Florida Supreme Court recognizes that sovereign immunity does not extend to cover this case. The state supreme court has noted: "[Sovereign immunity] will not relieve the State against any illegal act for depriving a citizen of his property;

neither will it be permitted as a plea to defeat the recovery of...property wrongfully taken by the State through its officers and held in the name of the state." *State Road Department of Florida v. Tharp*, 1 So.2d 868, 869 (Fla. 1949). Whether this be called a waiver, consent to be sued, or a statement of the limits of Florida's sovereign immunity under the Eleventh Amendment, the result is the same. *See* 459 F.Supp. at 528-30.

CONCLUSION

The decision below does not conflict with any decisions by this Court or with any decisions by another Court of Appeals. The opinion below is fully in accord with the principles of law established by this Court. There is no reason under the guidelines set forth by this Court in Rule 17 to grant Certiorari in this case. The Petition for Certiorari should be denied.

Respectfully submitted,

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